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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

JOSEPH A. RISO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ANNA R. LAVIN
53 West Jackson Boulevard
Chicago, Illinois 60604
Attorney for Petitioner

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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To The Honorable: The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

The Petitioner, Joseph A. Riso, prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit in the cause entitled *United States of America,* Plaintiff-Appellee, v. *Joseph A. Riso,* Defendant-Appellant, No. 16879 of that Court.

OPINION OF THE COURT BELOW

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on December 27, 1968, and is not yet reported; it appears in the printed appendix filed herein and in the record filed simultaneously herewith, and certified by the Clerk of the United States Court of Appeals for the Seventh Circuit.

The Petition for Rehearing was denied on January 20, 1969, and the Order denying said Petition is set forth in this Petitioner's Appendix hereto and in the certified copy of the record.

STATEMENT OF JURISDICTION

The order of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was filed on December 27, 1968. On the 20th day of January, 1969, it was ordered that the Petition for Rehearing be denied. This Petition is filed within thirty (30) days after the denial of the Petition for Rehearing. The jurisdiction of this Court is invoked under 28 U.S.C., §1254(1).

QUESTION PRESENTED FOR REVIEW

1. Does the bare receipt of a carton containing a painting of religious motif, fifteen months after theft, by the petitioner from a nun in front of a Church, supply probable cause for his arrest without warrant for a violation of section 2315 of Title 18, United States Code, and a search incident thereto?

2. Were FBI agents authorized under Title 18 U.S.C. §3052 to arrest petitioner without warrant?

3. Does the indictment charge an offense cognizable under federal law, and particularly under Title 18, U.S.C., §2315, in that it relies, for the painting's constituting interstate commerce on the fact allegation that "it *had been* transported from Renesselaer, Indiana, to Chicago, Illinois."[1]

4. When it plainly appears from the record that the petitioner was not charged with a crime cognizable under the laws of the United States, and none was proved against him, will not this court reverse his conviction as a guard against injustice?

STATUTES INVOLVED

18 U.S.C. §2315

Sale or receipt of stolen goods, securities, moneys, or fraudulent State tax stamps

"Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of $500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken; or

"Whoever receives, conceals, stores, barters, sells, or disposes of any falsely made, forged, altered, or counterfeited securities or tax stamps, or pledges or accepts as security for a loan any falsely made, forged, altered, or counterfeited securities or tax stamps,

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[1] This point was not raised below, but as an attack on jurisdiction, we submit it is appropriate to raise at any stage.

moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been so falsely made, forged, altered, or counterfeited; or

"Whoever receives in interstate or foreign commerce, or conceals, stores, barters, sells, or disposes of, any tool, implement, or thing used or intended to be used is falsely making, forging, altering, or counterfeiting any security or tax stamp, or any part thereof, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing that the same is fitted to be used, or has been used, in falsely making, forging, altering, or counterfeiting any security or tax stamp, or any part thereof—

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

"This section shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of an obligation or other security of the United States or of an obligation, bond, certificate, security, treasury note, bill, promise to pay, or bank note, issued by any foreign government or by a bank or corporation of any foreign country. As amended Oct. 4, 1961, Pub.L. 87-371, § 3, 75 Stat. 802."

Title 18 U.S.C. § 3052

Powers of Federal Bureau of Investigation

"The Director, Associate Director, Assistant to the Director, Assistant Directors, inspectors, and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony. As amended Jan. 10, 1951, c. 1221, § 1, 64 Stat. 1239."

STATEMENT OF THE CASE

This action was commenced by the return of an indictment charging the Petitioner, Joseph A. Riso, in one count, with violating Section 2315, Title 18, United States Code, in that he did receive and conceal goods, wares, and merchandise of a value of $5,000.00 or more, to-wit: a painting entitled, "The Virgin and Child With St. Nicholas of Bari and a Donor" which painting was moving as, was a part of, and did constitute interstate commerce in that it had been transported from Rensselaer, Indiana, to Chicago, Illinois, then and there knowing such painting to have been stolen, unlawfully converted and taken. (A. 4)

A plea of not guilty was entered on June 30, 1967, and on July 7, 1967, a Motion to Suppress Evidence was filed (A. 10-11), which motion was denied on January 31, 1968, after hearing. (App. 21-90)

The cause proceeded to trial on February 1, 1968, before the Court sitting with a jury. (A. 91-212) A verdict of guilty was returned and judgment entered thereon on February 5, 1968, and on March 19, 1968, this Petitioner was ordered committed to the custody of the Attorney General for a period of eight years.

On appeal to the United States Court of Appeals for the Seventh Circuit, it was contended that the warrantless arrest of the petitioner and the search of him and his vehicle as an incident thereof was done without reasonable cause to believe that the petitioner had committed a crime; and, that the Government had failed to sustain its burden of proving the essential elements of the crime charged, particularly the value of $5,000.00 or more of the property and knowledge on the part of the petitioner of the stolen character of the property.

STATEMENT OF FACTS

On October 31, or November 1, 1965, a religious painting bearing the legend "The Virgin and Child with St. Nicholas of Bari and a Donor" was stolen from the library of St. Joseph's College in Rensselaer, Indiana. Fifteen months later, agents of the Federal Bureau of Investigation were conducting a surveillance of the Fine Arts Frame Company at Hubbard and State Streets, Chicago, Illinois. (A. 92)[2] This is a location one block north of the Chicago River and about three blocks north of the business heart of Chicago, the loop. The agents observed a nun[3] enter the store carrying a cardboard carton about 40" x 30". (A. 94)

While the nun remained in the store, Agent Baker left his car and walked to the front of the store where he looked in and saw the nun standing before a counter, behind which

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[2] The Fine Arts Frame Company is among the, if not the, most prestigious, and expensive, business of its type in Chicago. It is located directly across the street (Hubbard) from Marina City, a modern Chicago landmark.

The Court will note the decision of the United States Court of Appeals for the Seventh Circuit indicates that in the Complaint for Arrest (filed after the arrest) that "the government had received information from a confidential informant that the defendant [petitioner] would transport the painting on January 25, 1967" (App. 1) Obviously, whatever information was received did not lead directly to the petitioner (Cf. *Draper* v. *United States*, 358 U.S. 307), nor is the prolonged surveillance of the framing shop and of the nun explained in any way. The informer's alleged information can be paid no heed in the circumstances.

[3] The opinion of the United States Court of Appeals refers to a woman in nun's garb and makes a point that "according to the Government's closing argument below, she may not have actually been a nun." (App. 2). There is nothing in the record to substantiate any question about the authenticity of her habit, and the agents who interviewed her constantly refer to her in their testimony as a nun.

was a man unidentified on this record. On the counter was a painting which he recognized having been the one taken from St. Joseph's. (A. 96) Baker's recognition of the painting was based on the fact that he had been assigned to the investigation concerning the stolen painting some fifteen months before, he had received detailed descriptions of the painting and had seen newspaper pictures of it. While there are some size and framing discrepancies, it is conceded for the purpose of this petition that he did, indeed, recognize the painting as the one stolen. An hour later the agents on surveillance saw the nun leave the store and enter a passing taxi. (A. 97-98) They followed the taxi to the vicinity of Addison and Paulina Streets, in Chicago, Illinois, a distance of about six miles from the framing store, on Chicago's northside. The cab followed a conventional route making directly for Michigan Avenue to the Outer Drive to Addison, down Addison (past Wrigley Field, where the Cubs and Bears play) about ten to twelve blocks to the Church. There the nun left the taxi and the driver carried the paper cardboard carton to the steps of St. Andrew's (this is a large Church, and formerly the seat of the Auxilliary Bishop of Chicago). The nun then paid off the driver and the driver left. (A. 206) Shortly thereafter the petitioner arrived in a vehicle, parked it a short distance from the entrance to the church, opened the trunk, and went up the stairs to meet the nun. The nun then descended the stairs and disappeared carrying the cardboard carton into an areaway leading to the rectory or convent, then reappeared carrying what was apparently the same cardboard carton and handed it to the petitioner, and he placed it in the trunk of his vehicle. (A. 47, 105, 208) At this time, the agents approached the petitioner and put him under arrest for a violation of Section 2315, Title 18, United States Code. (A. 47, 105)

REASONS FOR GRANTING THE WRIT

This Court should issue its Writ of Certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit for the following reasons:

I. The Court below decided an important Fourth Amendment question in this case in a manner completely in conflict with this Court's decision in *United States* v. *Di Re,* 332 U.S. 581. Here the case is more aggravated in that the associate is tacitly agreed to have had no criminal motive.

II. This Court should exercise its power of supervision to contain federal agents within their statutory authority to arrest without warrant only on account of offenses against the United States.

III. This Court should contain criminal sanctions to laws against the United States, and reverse for want of jurisdiction a conviction based on facts alleged in an indictment where federal jurisdiction is negated.[4]

IV. When the proof, as here, shows no violation of the laws of the United States, this Court should, in its supervisory power, as a guard against injustice, reverse the conviction.

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[4] This point was not raised in the Courts below. We believe it is a basis for collateral attack. However, because of this conviction, petitioner's probation on a state charge was revoked, and, because of the revocation based on this conviction, his bond pending appeal from this conviction was revoked. He is presently incarcerated on this conviction.

I. AND II.

Fifteen months after a painting of religious theme was stolen from a school library in Rensselaer, Indiana, an F.B.I. agent recognized it from a distance of ten to fifteen feet away, through the window of a painting framing shop in Chicago, Illinois.[5]

The nun, after an hour in the framing shop, apparently discussing proper framing, emerged carrying a box suitable to hold a painting of the size that had been seen.

Entering a taxi, she proceeded directly to Saint Andrew's Catholic Church, on the northwest side of Chicago, Illinois. The taxi driver assisted her by carrying the carton up the steps of the Church. After she paid him his fare, he left. About this time petitioner appeared, parked his car near the entrance to the Church, and ascended the Church steps to meet her. They spoke, she descended with the package and entered the walkway leading to the Church Rectory or Convent. Reappearing moments later, she handed the carton to the petitioner and he put it in the trunk of his car.

Thereupon, he was placed under arrest for a violation of Title 18, United States Code, Section 2315, in that he did receive and "conceal" merchandise of a value of $5,000

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[5] The agent had never before seen the painting, but had had it described to him in apparent detail and had seen newspaper pictures of it. Though we doubt if anyone, including an art expert, would be able to identify the painting under the circumstances, we assume for this petition that he did recognize it as he testified.

or more moving in or as a part of, or which constituted interstate commerce, knowing such property to have been unlawfully taken.

In sum, information on which the agents made the arrest was that petitioner received a carton in broad daylight, at about noon, on a city street in full view of all who wished to see.

While the F.B.I. agents surmised the carton contained the painting, they had not the slightest indication of any such knowledge, or even speculation, on the part of the petitioner. The nun did not testify, nor, for that matter, is she identified on this record. Though the agents spoke to her at the scene she was not detained. It would seem that, with the knowledge at the hands of the agents, even they could not justify the arrest of petitioner without the arrest of the nun, who is clearly shown to have knowledge of the contents of the package. It would appear the agents were satisfied of her innocence. How then can be justified the arrest of petitioner? Though in this Court's decision in *United States* v. *Di Re*, 332 U.S. 581, the associate was a criminal, and thus the facts more aggravated than here, this case is in direct conflict with that decision.

> "The argument that one who 'accompanies a criminal to a crime rendezvous' cannot be assumed to be a bystander, forceful enough in some circumstances, is farfetched when the meeting is not secretive or in a suspicious hide-out but in broad daylight, in plain sight of passersby, in a public street of a large city, and where the alleged substantive crime is one which does not necessarily involve any act visibly criminal. If Di Re had witnessed the passing of papers from hand to hand, it would not follow that he knew they were ration coupons, and if he saw that they were ration

coupons, it would not follow that he would know them to be counterfeit. Indeed it appeared at the trial to require an expert to establish that fact." *United States* v. *Di Re,* 332 U.S. 581, 593.

No theory of recent possession can supply the knowledge element (compare App. 6-7). Though fifteen months is a long time under any circumstances to employ the recent possession theory when property is found on a person, it may be rationalized under proper evidence that he concealed it because of its contraband nature. But here, the evidence shows the property did not come into the hands of the petitioner until *fifteen* months after its theft.

Further, the agents had no reason to believe the painting was moving, was a part of, or constituted, interstate commerce. There is no evidence nor reason to infer the painting had not been transported from Indiana to Illinois fifteen months before. The power of the agents to arrest without warrant is strictly circumscribed by Title 18 U.S.C., §3052 and confined to "any offense against the United States . . . or for any felony cognizable under the laws of the United States . . ."

All their knowledge lends inevitably to the conclusion that interstate commerce had come to rest. The activities of the nun, the hour long discussion over framing, the casualness, the openness—all tending to the conclusion that the painting had long since reached its destination.

III.

The indictment herein reads as follows:

"The JUNE, 1967 GRAND JURY charges:

"On or about January 25, 1967, at Chicago, in the Northern District of Illinois, Eastern Division,

JOSEPH A. RISO,

defendant herein, did receive and conceal goods, wares and merchandise of a value of Five Thousand Dollars ($5,000.00) or more, that is, a painting entitled, 'The Virgin and Child with Saint Nicholas of Bari and a Donar', which such painting was moving as, was a part of and did constitute interstate commerce in that it *had been transported from Rensselaer, Indiana to Chicago, Illinois,* then and there knowing such painting to have been stolen, unlawfully converted and taken; in violation of Title 18, United States Code, Section 2315." (Emphasis Ours.)

The factual allegations do not charge a crime under Title 18, U.S.C. §2315, in that movement in interstate commerce after a theft is not property "moving as, or which are a part of, or which constitute interstate . . . commerce, . . ."

This decision of the United States Court of Appeals for the Seventh Circuit is at complete variance with its own prior decision under the predecessor statute:

> "Under the act here relied upon, the receiver is not guilty unless the property which he receives has been stolen while moving in or constituting a part of interstate commerce. In the present case the property received by appellant was not stolen while moving in such commerce. Rather it was stolen in the state of Missouri, thereafter transported to Chicago, and then delivered to appellant." *Gable* v. *United States,* 7 Cir., 84 F.2d 929, 930.

It is true the predecessor statute had slightly different wording, however "stolen while moving in or constituting

a part of interstate commerce" must be held to have a meaning akin to receiving "goods . . ., moving as, or which are a part of, or which constitute interstate commerce."

In *Grimsley* v. *United States,* 5 Cir., 50 F.2d 509, the defendant was charged under a similiarly worded statute, to-wit: the National Motor Vehicle Act [then 18 U.S.C. §408].

The statute under which he was charged proscribed "one who receives, conceals, stores, barters, sells, or disposes of a motor vehicle, 'moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen.'" The Fifth Circuit held:

> "It is an essential element of the offense under the fourth section that the accused receive the motor vehicle while it is moving as, or is a part of, or constitutes, interstate or foreign commerce. The act, as is apparent on the face of it, is based upon the commerce clause of the Constitution, and does not assume to punish one who receives or sells a stolen motor vehicle after it has ceased to move in, or be a part of, interstate or foreign commerce. Brooks v. United States, 267 U. S. 432, 45 S. Ct. 345, 69 L. Ed. 699, 37 A. L. R. 1407. This essential element was not alleged in the indictments under consideration.
>
> "It is true that each appellant was charged with knowledge that the automobile which it was alleged he received and sold had been previously transported in interstate commerce; but for all that appears in either indictment, such transportation had come to an end and the automobile had come to rest in Florida long before the accused received or sold it. The indictments, under the most liberal interpretation, charged only the ordinary offense against the state law of receiving stolen goods with knowledge that they had been stolen; they failed to charge directly, or even by

implication, an offense within the jurisdiction of the federal District Court. An indictment is fatally defective which omits an essential element of the offense sought to be charged." *Grimsley* v. *United States,* 5 Cir., 50 F.2d 509-510.

To the same effect see *Davidson* v. *United States,* 8 Cir., 51 F.2d 250 at 255.

IV.

Where it clearly appears as it does here that a defendant has been convicted of an offense which the evidence fails to show was committed or that he committed it, the error of submitting the case to the jury for a determination is so plain and vital that this court is at liberty to and will reverse, solely in the public interest as a guard against injustice. *Wiborg* v. *United States,* 163 U.S. 632, 659.

CONCLUSION

Wherefore, for the above and foregoing reasons, it is respectfully submitted that this Court should issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to review the decision in this court.

Respectfully submitted,

ANNA R. LAVIN
Attorney for Petitioner